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ABSTRACT

Historically, legal issues have not been well represented in the higher education research literature. Two sources, however, regularly discuss legal issues: the Journal of College and University Law and the Chronicle of Higher Education. Three main themes emerge in the literature on legal issues: (1) rethinking and refining of traditional policies; (2) the rise in campus issues; and (3) technology. The little research in the higher education journals or at conferences that relates to issues of academic freedom, faculty collective bargaining, and tenure tends to define these issues philosophically rather than from a legal perspective. Literature on copyrights, patents, and research involving human subjects is minimal. New literature, mostly opinion pieces, continues to be written about ambiguous issues that emerge in cases involving affirmative action, sexual harassment, discipline, due process, discrimination, and athletics, but research is needed on the erosion of immunities and tort caps traditionally relied upon by college and university administrators for protection against lawsuits. A new legal issue coming to the fore includes planning for changes in technology and the legal ramifications of computerizing college campuses. Other areas where more analysis and literature are needed include ethics and professional practices. (Contains 7 references.) (JM)

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Higher Education Trends (1997-1999)
Legal Issues

by Adrianna J Kezar

Historically, legal issues have not been well represented in the higher education research, legal analysis remains underrepresented in 1996. Higher education's autonomy and the separation of legal issues into a specific function on most campuses appear to have marginalized dialogue about legal issues. Two sources, however, keep legal issues integrated, if only on the sidelines, in the higher education dialogue: *Journal of College and University Law* and *The Chronicle of Higher Education*. Each year, *Journal of College and University Law* reviews the pertinent issues for the year, including First Amendment rights, invasion of privacy, tort liability, immunities, civil procedures, access to records and meetings, funding, employment (especially with the growing number of faculty lawsuits), disciplinary decisions, discrimination against students, and intercollegiate athletics. *The Chronicle of Higher Education's* legal section captures current legal debates. In 1996, *The Chronicle* described changing views on affirmative action, Title VI, sexual harassment, and faculty employment disputes.

Three main themes emerge in the literature on legal issues: (1) rethinking and refining traditional policies; (2) the rise of legal issues on campus; and (3) new issues for legal consideration, such as technology. Surprisingly, little research in the higher education journals or at conferences relates to issues of academic freedom, faculty collective bargaining, and tenure. These issues are often discussed philosophically, but not from a legal perspective. Further, literature on copyrights, patents, and changes in research involving human subjects is minimal. Numerous topics appear to need thoughtful legal analysis.

Refining Policy

Many campuses are refining their policies on affirmative action, sexual harassment, discipline, due process, discrimination, and athletics. New literature, mostly opinion pieces, continues to be written to develop an understanding about ambiguous issues that emerge in these cases. For example, *The Chronicle's* story about the Brown student accused of sexual harassment highlights how the accused can become a victim. Another example, was an article critiquing the court's ruling that the proportion of woman intercollegiate athletes must equal the proportion of women undergraduates on the grounds that it may compel colleges and universities to distort the allocation of resources for college athletics (Guenin). Specific functional areas of a university have considerable reason to be concerned about legal ramifications because of the nature of their work. For example, development officers are concerned about several areas involving donors' records, including who sees them (administrators, donors, volunteers, and members of the legal profession), how access to them is controlled, and what is kept in them (Walker). Research on how campuses are handling policy development and implementation is needed. And how policies operate in practice is virtually unstudied.

The Rise of Legal Issues on Campus

In many ways, higher education institutions have remained protected from the onslaught of

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lawsuits that has become prevalent in many sectors of our society. College and university administrators are becoming concerned about the steady erosion of immunities and tort caps they traditionally have relied on for protection against lawsuits. In this context, institutions need to consider their protection in the areas of extension of protection to all employees, the scope of employment, nongovernmental functions, foundations and related activities, the cost of legal defense, federal court actions, out-of-state activities, and liability insurance (Broadhurst). Research should explore the impact of this growing litigious environment on higher education institutions. How is it affecting educational policy, budgets, and decision making? Are boards/trustees becoming more involved in these legal issues? And how can boards/trustees help or hinder the legal environment on campus?

New Legal Issues

In addition to the traditional legal issues in higher education, changes in the environment are providing new areas for inquiry. Steven Gilbert describes the way that changes in technology need to be planned for, including the legal ramifications of computerizing campuses. Each year at the CAUSE conference, legal issues play a prominent role, and 1996 was no exception: "The 1990s Challenge of Insulating the Institution with 1980s Information Technology Policies" examines security and privacy from the legal standpoint(Cause Proceedings). Additionally, Paul T. Rhinehart describes the impact of technology and its challenges for campuses in his article, "The Use of Electronic Data Interchange under the Family Educational Rights and Privacy Act."

Few academic fields appear to be developing policy to protect themselves from legal challenges. Only the medical profession seems to be engaged in a discussion about ethics, professional practices, and legal implications (Silverman). This is an area where more analysis and literature is needed.

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